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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MYKOLAY McGOWEN, Defendant and Appellant.	A152294 (Alameda County Super. Ct. No. 610425B)

Defendant Mykolay McGowen was convicted of, among other things, the premeditated attempted murder of two victims and the attempted murder of a third victim based on the "kill zone" theory of liability.[1] On appeal, he contends that his trial counsel rendered ineffective assistance by failing to object to testimony by police officers regarding the alleged motive for the shooting and that, with or without this motive testimony, there is insufficient evidence to support the convictions. With respect to the third attempted murder conviction, defendant contends, among other things, that there is insufficient evidence to support a finding that the victim was within the kill zone when he was shot. Finally, defendant seeks resentencing under recent statutory amendments that permit the court to strike the three 25-year-to-life sentence enhancements. We agree that defendant's conviction for the third attempted murder must be reversed and that the matter must be remanded for the limited purpose of allowing the trial court to exercise its

[1] Defendant was charged with codefendant Anthony Smith but Smith's trial was severed on the prosecution's motion.

discretion to strike the sentence enhancements. We shall affirm the judgment in all other respects.

Factual and Procedural Background

Defendant was found guilty of willful, deliberate, and premeditated attempted murder of Myzil and Christian Waters (Pen. Code,[2] §§ 187, subd. (a), 664, subd. (a)), attempted murder of Dan Tran (§§ 187, 664), assault with a semiautomatic firearm (§ 245, subd. (b)), and unlawful possession of a firearm by a prohibited person (§ 29805). The jury also found true allegations that defendant inflicted great bodily injury (§§ 12022, 12022.7, subd. (a)) and personally discharged a firearm (§ 12022.5, subd. (a); § 12022.53, subds. (b)-(d), (g)) in committing the attempted murders and assault.

The following evidence was presented at trial.

Shortly after 5:00 p.m. on April 13, 2015, Christian and Myzil Waters were standing in front of their house in the 65th Avenue area of East Oakland when shots were fired in their direction. Christian suffered serious gunshot injuries to his right wrist and left leg while Myzil's hip was shattered by a bullet. The two brothers ran into a nearby store where the owner called the police. Christian claimed it was only he and his brother in front of his home that day; Savon Mims was not there.[3]

At the time of the shooting, Dan Tran was working at his auto mechanic's shop, located between the point from which the shots were fired and where the Waters brothers were standing. Tran was shot as he stepped out of a car that was parked in the front lot of the shop.

Surveillance video from Tran's shop shows a man exit the passenger side of a black sports utility vehicle about two cars length from the corner. He walks to the corner, turns to his right and immediately starts shooting. Photographs of the street show the location where Tran was shot and where the Waters brothers were gathered.

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[2] All statutory references are to the Penal Code unless otherwise noted.

[3] The brothers did not testify voluntarily and were generally uncooperative throughout the investigation.

Oakland Police Sergeant Jeffrey Smoak heard the gunshots and responded to the area. Smoak viewed the security camera footage from Tran's garage, which showed a man exiting the passenger side door of a "full-size, dark-colored SUV" with a license plate displayed on its dashboard and firing a handgun towards the Waters brothers. The shooter visible on the footage "was an African- American male" with "a little bit of a heavy build, average height," a "distinctive hairline [that] was rather far back on his head," and a "hooded sweatshirt" with the word " 'Cali' on the front in white lettering." Based on information obtained from another officer, Smoak drove to the 57th Avenue area of Oakland "hoping to locate the vehicle . . . on the video" footage. He saw "a large SUV" that was the "same color" as the one in the footage and also had a "license plate . . . placed in the upper right-hand corner of the dashboard." Smoak "did a file check" on the vehicle and house and found defendant's name associated with both. Smoak then "retrieved [a] photograph" of defendant and noted a resemblance to the shooter seen in the video. Specifically, "the complexion, build," and "the hairline . . . appeared to be similar," and "the hooded sweatshirt that [defendant] was wearing in the photo . . . looked to be the similar same hooded sweatshirt that he was actually wearing in the video." Based on his observations, Smoak "directed officers to surround the residence" with the ultimate "intent . . . to search the house for [defendant] and for any evidence of the crime."

While officers were waiting to arrest defendant, his mother left the residence and drove away in the SUV. Officers initiated a traffic stop and took custody of the vehicle, which still had a license plate located on its dashboard. Shortly after defendant's mother left the house, defendant ran out of the rear of the house and attempted to evade the police. Ultimately officers located defendant on a roof and arrested him.

Defendant's fingerprints were found on the passenger side door of the black SUV, while Anthony Smith's fingerprints were found on the driver's side of the car. In a subsequent search of defendant's home, officers found a "memorial shirt" for an Isaiah Smith and ammunition that matched the brands of ammunition found at the crime scene.

Oakland Police Sergeant Clay Birch, who was assigned to the violent crime reduction task force patrolling this area of Oakland, testified that he was familiar with two different groups of young men that congregated in this area. The Waters brothers and Savon Mims identified with a group that congregated in the area between 64th and 65th Avenues. Defendant and Anthony Smith identified with a group that congregated in the area between 55th and 57th Avenues.

Oakland Police Sergeant Leonel Sanchez testified that the two groups were embroiled in "a dispute" that involved "significant criminal events," including shootings. He testified that Isiah and Anthony Smith were brothers and that 14-year-old Isiah was murdered on November 29, 2014. Sanchez was the lead investigator on Isaiah's murder. Christian Waters was initially identified as a person of interest in the homicide of Isaiah Smith but as of the time of defendant's trial, charges were pending against Savon Mims and another member of the group that was associated with the area of 64th and 65th Avenues. When he interviewed Christian Waters in the course of the Smith murder investigation, they discussed the dispute between the two groups and Waters told him that he thought he was shot because his name was "being mentioned as being one of the suspects involved in Isaiah Smith's murder." Christian also told Sanchez that Mims was with the Waters brothers when they were shot.

Defendant was sentenced to prison for a term of 85 years 8 months to life. Defendant timely filed a notice of appeal.

Discussion

1. *Attempted Murder of the Waters Brothers*

The jury found defendant guilty of willful, deliberate, and premeditated attempted murder of Myzil and Christian Waters. Defendant contends that his trial attorney rendered ineffective assistance by failing to object to testimony by Sergeants Sanchez, Birch and Smoak regarding the feud between the two neighborhood groups and the alleged motive for the shooting. He argues that the failure to object was prejudicial because absent the allegedly inadmissible motive evidence there is insufficient evidence to support the verdict. We disagree.

Prior to trial, the court and counsel discussed the admissibility of evidence regarding the alleged feud and the possible motive for the shooting. The trial judge asked the prosecutor how he planned to introduce the relationships between defendant and Isaiah and Anthony Smith. When he responded that Sanchez would testify that he learned that Isaiah and Anthony were brothers during the course of his investigation, the court questioned whether such testimony would be based on inadmissible hearsay. Ultimately, the court noted that counsel would need to address the hearsay concerns, by stipulation or some other basis, before the evidence could be admitted. With respect to the alleged feud, the court asked the prosecutor, "Is it your intention to have information and testimony from somebody about the fact that these two sets of people don't get along?" The prosecutor said yes and explained that he was planning to call the Waters brothers to testify to these facts but that he was unable to predict exactly what they would say. He explained, "I can't guess what they're going to say when they get here. . . . They're just as likely to be sitting on the defendant's side of the table as they are on the witness stand. . . . [I]t is difficult to predict . . . what I am going to have to impeach them on." The prosecutor added that he was planning to call Sanchez to offer impeachment testimony depending on how the trial progressed. According to the prosecutor, "there are recorded interviews of Christian Waters where he openly talks about there are these groups of people and he's on one side. . . . [That] there is two groups of people, . . . they don't get along, that is something I expect to come out in more than one way." The court agreed that the evidence could be admitted through Christian Waters either directly or as impeachment.

Christian Waters did not testify voluntarily. He claimed to have known Isaiah Smith through Facebook and denied that they were enemies. He claimed not to have known Anthony Smith. He testified that he had known defendant all of his life and that they were friends. Waters acknowledged being interviewed by Sanchez in June 2015 but denied that he and Sanchez discussed whether defendant had shot him. Waters acknowledged only generally that there was some sort of dispute between the two

neighborhood groups, perhaps involving a dirt bike. Waters denied telling Sanchez that he thought people were shooting at him that day because of the murder of Isaiah Smith.

Prior to Sanchez's testimony, the prosecutor detailed in an email to the court and defense counsel the portion of Waters's testimony for which impeachment would be offered. With respect to the motive for the crime, the court stated, "Christian told Detective Sanchez, in his June 20th, 2015 interview that he believed he was shot because he was suspected to have had something to so with the Isaiah Smith murder. That area will be allowed because in reading from the transcript . . . Christian Waters did deny that he told Sanchez that he thought people were shooting at him because of the murder of Isaiah Smith." When asked whether he had any objection, defense counsel indicated that he did not. Sanchez's direct testimony was limited and within the bounds approved by the court.

Defendant's argument on appeal, which frames the error as opinion testimony relating inadmissible hearsay in violation of *People v. Sanchez* (2016) 63 Cal.4th 665, is disingenuous and largely misses the point. The police officers in this case did not testify as experts. Although there are some similarities between this case and a gang-related case, the officers here did not provide the extensive background information on the feuding groups that is permitted under *Sanchez*. Their testimony was carefully tailored to rebut Christian's testimony that there was no significant dispute between the two neighborhood groups and no known motive for the shooting. Defendant fails to address the admissibility of this evidence for impeachment purposes. Defendant's blanket objection to the officers' testimony is without merit.[4]

Contrary to defendant's argument, the motive testimony coupled with the video evidence is sufficient to support the attempted murder convictions. The fact that there

[4] While small portions of the officers' testimony may have related hearsay, defense counsel failed to object in the trial court and defendant has not identified any specific testimony to which he claims an objection should have been made. Given the clear admissibility of most of the testimony, any failure to object to specific portions likely was not prejudicial.

was no eyewitness identification of defendant as the shooter is mitigated by the comparison of the video with defendant as he appeared in his photograph and as he sat in the courtroom. While the video quality is not particularly good, there is a resemblance between the shooter and defendant and the match between the shooter's car and defendant's car is undeniable. The motive evidence, though not essential, further supports the conclusion that defendant was the shooter. There was thus sufficient evidence to support defendant's convictions for the attempted murders of Christian and Myzil Waters, and the convictions cannot be attributed to any deficiency in defense counsel's representation.

2. *Firearm Enhancements*

Defendant was sentenced to consecutive life terms for the two premeditated attempted murder convictions. The court also imposed additional terms of 25 years to life on each count under section 12022.53, subdivision (d). While the enhancement was mandatory at the time of sentencing, subdivision (h) of section 12022.53 has since been amended to afford the trial court discretion to strike the enhancement. We agree with the parties that the amendment applies retroactively to defendant's case and that a limited remand is required to allow the trial court the opportunity to exercise its discretion in the first instance.

3. *Attempted Murder of Tran*

Defendant was convicted of attempted murder of Dan Tran based on the "kill zone" theory of liability. The jury was instructed regarding the kill zone theory as follows, "A person may intend to kill a specific victim or victims, and at the same time intend to kill everyone in a particular zone of harm or kill zone, if you will. In order to convict the defendant of the attempted murder of Dan Tran, the People must prove that the defendant not only intended to kill Christian Waters or Myzil Waters or Savon Mims, but also either intended to kill Dan Tran or intended to kill everyone within the kill zone. If you have a reasonable doubt that the defendant intended to kill Dan Tran or intended to kill Christian Waters, Myzil Waters, or Savon Mims by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Dan Tran."

In closing, the prosecutor argued, "[W]hen there is a crime such as this of attempted murder and there are more than one victim of attempted murder, more than one person who is shot, what you have to determine is who the defendant's target was and whether somebody was within the kill zone of where the defendant was intending to shoot these folks. [¶] . . . The law isn't going to tell you where this kill zone extends to and who it [includes]. That is a conclusion you have to come to." He continued, "A kill zone is also defined as a zone of harm. I am not going to sit here and tell you that I can tell you 100 percent that the defendant saw Mr. Tran, intended to kill Mr. Tran. I don't think in any version of the events that you are going to come to the conclusion that the defendant went out there that day to kill Dan Tran or shoot Dan Tran or to try to kill Dan Tran. He went out there for a specific reason: to shoot, to try to kill Myzil, Christian Waters, and Savon Mims. The question is going to be whether Dan Tran is in the kill zone." The prosecutor offered the following scenario as an example of a kill zone: "If there had been 20 or 30 feet beyond Christian and Myzil Waters, another person, an innocent bystander walking, a child playing, a person walking to the store, and they had been the unfortunate victim and been shot with a bullet, or each died, there would be no doubt that they were in the kill zone." He continued, "look at the video in this case . . . . What you will notice is Mr. Tran unfortunately gets out of that car and takes a turn right toward the defendant at the beginning when the defendant levels the gun and begins shooting. Unfortunately he turned directly in the line of fire where the defendant was shooting, down that fence line towards that group of people. . . . [¶] Now, I would submit to you that a fair view of the evidence would suggest that Mr. Tran took one of the earlier bullets in this case. . . . [¶] And After Mr. Tran is shot, the bullets keep flying; the defendant doesn't stop. Did he know he shot Dan Tran? I don't know. Does it matter? Not really. But look at the photograph from where the defendant would have been standing.[5] This is the corner. You look directly down this sidewalk. There is a group of

[5] Although not referenced by number, we believe the prosecutor is referencing the People's exhibit 1-G, which is attached as an appendix to this opinion.

people — police officers clustered during the investigation — and based in the various photographs, this is about the location . . . where Christian, Myzil, and potentially Savon Mims were standing. This is a very close target area to be firing 14 shots. [¶] Now Mr. Tran, you can kind of see in this photograph. The open door of the Mercedes right here. And Mr. Tran stepped out of it and turned towards the defendant. This is a public area, a busy intersection . . . . [¶] We are lucky that we are here on three counts of attempted murder and not murder or more." The prosecutor concluded his argument stating if "you come to the conclusion that [defendant] is guilty of the first two counts, which are premeditated, willful attempted murder as to Myzil and Christian Waters and you start to talk about the kill zone as to Dan Tran, and whether . . . he is not beyond Myzil and Christian, he is before them, he maybe wasn't visible to the defendant and he steps out right into the path of the bullets and instantly kind of goes back into the car and maybe the defendant didn't see him and didn't notice, . . . that's not really relevant to the kill zone analysis because anybody in that line of fire is in the kill zone."

Defendant contends that the "kill zone" instruction was incomplete because it failed to define the scope of the kill zone, the prosecutor's argument misstated the law and there is insufficient evidence to support a finding that Tran was within the kill zone. Defendant acknowledges his trial attorney's failure to object to the instruction or to the prosecutor's closing argument but argues the failure to do so amounts to ineffective assistance of counsel. We agree that there was not sufficient evidence to support the kill zone instruction and that the prosecutor's closing argument so misstated the relevant law that the failure to object constituted ineffective assistance of counsel.

"There is a crucial distinction between the mental states required for a defendant to be convicted of murder and attempted murder: 'Murder does not require the intent to kill. Implied malice—a conscious disregard for life—suffices.' [Citation.] In contrast, ' "[a]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." ' [Citations.] [¶] This distinction has created complications in cases where a defendant attacks multiple victims. Under the doctrine of transferred intent, when a defendant fires a gun in an attempt to kill

one victim, but the bullet strikes and kills a bystander, the defendant is guilty of murder even if he did not know the bystander was present. [Citation.] But the doctrine of transferred intent does not apply when an unintended victim survives the attack. [Citation.] The court in [*People v. Bland* (2002) 28 Cal.4th 313] reasoned that applying the doctrine of transferred intent would make liability for attempted murder too vague: 'The world contains many people a murderous assailant does not intend to kill. Obviously, intent to kill one person cannot transfer to the entire world. But how can a jury rationally decide which of many persons the defendant did not intend to kill were attempted murder victims on a transferred intent theory?' [Citation.] [¶] The Supreme Court in *Bland, supra,* 28 Cal.4th 313, introduced the kill zone theory to address another variation of this theme—situations in which a defendant attempts to kill an entire group of people in order to kill a specific victim. Because the defendant acts with the specific intent to kill everyone in the victim's vicinity, he is guilty of attempted murder of each member of the group. [Citation.] The theory of guilt here is not transferred intent, but rather concurrent intent, meaning that ' "the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." ' " (*People v. Cardona* (2016) 246 Cal.App.4th 608, 613-614, review granted July 27, 2016, S234660.) Thus, as relevant here, a "conviction for attempted murder under a kill zone theory requires evidence that the defendant created a kill zone; that is, while targeting a specific person he attempted to kill everyone in the victim's vicinity" and "before a defendant may be convicted of attempted murder under a kill zone theory, the evidence must establish that all the victims were actually in the kill zone." (*People v. Falaniko* (2016) 1 Cal.App.5th 1234, 1244; see also *People v. Smith* (2005) 37 Cal.4th 733, 755–756 (dis. opn. of Werdegar, J.) ["A kill zone, or concurrent intent, analysis, therefore, focuses on (1) whether the fact finder can rationally infer from the type and extent of force employed in the defendant's attack on the primary target that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm."].)

People v. Falaniko, *supra*, 1 Cal.App.5th 1234, is instructive. In that case, defendant was charged with numerous attempted murders arising out of three distinct factual situations all based on the kill zone theory. In the first scenario, defendant and two accomplices stood in the middle of the street and collectively fired their guns at least 34 times at a group of three suspected rival gang members who were on the front porch of a home about 15 to 20 feet away from where defendant stood. (*Id*. at pp. 1238-1239.) The court described this scenario as a "classic kill zone scenario." (*Id*. at p. 1246.) In the second scenario, defendant and an accomplice surrounded and opened fire on a group of people in a park, killing one and injuring two of the group. Another member of the party, however, was not with the group at the time of the shooting. "She was sitting in the front seat of the car when two young men passed by on the sidewalk. [She] heard loud popping noises that sounded like firecrackers and turned to see the two young men who had passed her car standing on the sidewalk with guns in their hands, shooting at her family. As the two men were walking past [her] car after the shooting, one of them fired his gun directly at [her]." (*Id*. at pp. 1239-1240.) With respect to this scenario, the court found that "there was evidence that appellant and his cohort created a kill zone in the park" but that "the evidence also established that [the victim]—who was sitting in her car some distance away—was clearly not in it." (*Id*. at p. 1244.) Finally, in the last scenario, the victims were working in a nightclub when defendant shot into the club. (*Id*. at p. 1241.) The court found that "there was no evidence that appellant created a 'kill zone,' much less that he intended to kill everyone who might have been in it. Thus, while the surveillance video showed the shooter firing into the building, there was no evidence from which the jury could reasonably infer that appellant specifically intended to kill every single person in the area, or any evidence that [the victims] were both in the 'kill zone' when they were shot." (*Id*. at p. 1244.) Ultimately, the court concluded with respect to the victim in the car at the park shooting and the victims in the nightclub shooting that "substantial evidence did not support conviction under the kill zone theory" and that the court erred in giving the kill zone instruction because it had "no application to the facts of the case." (*Ibid*.)

The facts in this case are notably different from those that uphold the kill zone theory. Tran was not a part of the group being targeted. He was two or three buildings away working in his auto shop. As the prosecutor acknowledged, it was unclear that defendant saw him or knew that he had been shot. Thus, while defendant may have created a kill zone around the Waters brothers by firing 14 shots indiscriminately at the group of two or three men, Dan Tran was not within that kill zone. The prosecutor's attempt to enlarge the kill zone to include any innocent bystander who happened to be on the block went too far. (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798 ["The kill zone theory thus does not apply if the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury. Nor does the kill zone theory apply if the evidence merely shows, in addition, that the defendant was aware of the lethal risk to the nontargeted individuals and did not care whether they were killed in the course of the attack on the targeted individual."].) The jury could not reasonably infer that defendant intended to kill the Waters brothers by killing everyone between him and them, even those he did not see. Substantial evidence does not support defendant's conviction for the attempted murder of Tran under the kill zone theory. (See *People v. Medina* (2019) 33 Cal.App.5th 146, 154 ["giving of a kill zone instruction was error because the evidence adduced at trial did not support it"].) Since no other theory was presented to the jury, the conviction must be reversed.

Defendant was also convicted of assaulting Tran with a firearm and sentenced to the upper term of nine years plus an additional 13 years on the sections 12022.7, subdivision (a) and 12022.5, subdivision (a) enhancements, stayed pursuant to section 654 in light of the attempted murder conviction. Because we reverse the attempted murder conviction, on remand the stay should be lifted. As discussed above, the court shall also exercise its discretion with respect to the enhancement imposed under section 12022.5, subdivision (a).

Disposition

Defendant's conviction for the attempted murder of Dan Tran is reversed, and the trial court is directed to vacate the stay of the sentence imposed for assault with a firearm on Tran. The remaining convictions are affirmed, but the case is remanded for the trial court to consider whether to strike the firearm enhancements imposed under Penal Code sections 12022.53, subdivision (d) and 12022.5, subdivision (a).

POLLAK, P. J.

WE CONCUR:

STREETER, J.
BROWN, J.

APPENDIX